**Matsu Corp. d/b/a Matsu Sushi Restaurant *and* Flushing Workers Center.** Case 01–CA–214272

June 28, 2019

DECISION AND ORDER

BY CHAIRMAN RING AND MEMBERS MCFERRAN AND KAPLAN

On October 26, 2018, Administrative Law Judge Kenneth W. Chu issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondent filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings,[1] findings,[2] and conclusions and to adopt the recommended Order as modified[3] and set forth in full below.

ORDER

The National Labor Relations Board orders that the Respondent, Matsu Corp. d/b/a Matsu Sushi Restaurant, Westport, Connecticut, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging employees for concertedly refusing to work an extra shift because of health and safety concerns or for engaging in other protected concerted activities.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Liguo Ding and Jianming Jiang full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

[1] Although the Respondent excepts to the judge's ruling limiting the evidence the Respondent could introduce regarding its purported investment dispute with employees Liguo Ding and Jianming Jiang, it did not make an offer of proof at the hearing, and it does not state on exceptions what additional evidence it would have presented had the judge permitted it to do so. Accordingly, the Respondent has failed to preserve this issue for review.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In adopting the judge's finding that the Respondent violated Sec. 8(a)(1) of the Act by discharging employees Liguo Ding and Jianming Jiang, we find, for the reasons stated in the judge's decision, that Ding and Jiang engaged in protected concerted activity by jointly refusing to work an extra shift because of health and safety concerns. We note that in arguing that the employees' concerted activity was not protected, the Respondent contends only that Ding and Jiang refused to work the extra shift not out of health concerns, but solely because of an investment dispute. The Respondent does not contend that the employees' refusal to work the extra shift would have been unprotected had it also been based on health concerns—and in agreement with the judge, we have found that it was substantially based on health concerns. We do not rely, however, on the judge's citation of *Brighton Retail, Inc.*, 354 NLRB 441 (2009), or *Alton H. Piester, LLC*, 353 NLRB 369 (2008), which were decided by a two-member Board. See *New Process Steel, L.P. v. NLRB*, 560 U.S. 674 (2010).

We agree with the judge that the record fully supports his finding that Ding and Jiang were discharged and did not quit, as the Respondent contends. An employee may be discharged without formal words of firing. "It is sufficient if the words or actions of the employer would logically lead a prudent person to believe his [or her] tenure has been terminated." *Nations Rent, Inc.*, 342 NLRB 179, 179–180 (2004) (internal quotation marks omitted). As explained in the judge's decision, the credited testimony shows that after Ding and Jiang informed the Respondent of their concerted refusal to work the extra shift, the Respondent told Ding there would be consequences for this, and thereafter told both employees that they needed to stay home, rest and not return to work. Ding and Jiang repeatedly inquired about returning to work, but the Respondent did not reply and instead paid them their outstanding wages. Under these circumstances, prudent persons would reasonably believe that their employment had been terminated. Moreover, in their Board affidavits, Marty Cheng, the Respondent's co-owner, and Yan Lin, its manager, acknowledged that Ding and Jiang had been discharged.

However, in finding the discharges unlawful, we do not rely on the judge's analysis under *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). A *Wright Line* analysis is not warranted here because the Respondent has not asserted that it discharged the employees for any reason other than their protected concerted refusal to work the extra shift. See, e.g., *CGLM, Inc.*, 350 NLRB 974, 974 fn. 2 (2007) (*Wright Line* not applicable where employees were disciplined for protected concerted activity, and no other motive was at issue); *Bon Harbor Nursing & Rehabilitation Center*, 348 NLRB 1062, 1062 (2006) (*Wright Line* analysis unnecessary where respondent did not assert any basis for the discharges other than the employees' concerted protest over staffing levels). Indeed, the Respondent does not concede that it discharged the employees at all. Its principal defense, which we have rejected, is that Ding and Jiang quit.

Member McFerran agrees that the record leaves no doubt that Ding and Jiang were deliberately discharged and did not voluntarily quit. However, in the absence of exceptions to it, she would not disturb the judge's *Wright Line* analysis, which essentially reached that same conclusion, finding that the Respondent's failure to continue to employ the two was motivated by their concerted activity and not by a belief that the two had voluntarily declined to work.

[3] We shall modify the judge's recommended Order to conform to the Board's standard remedial language, and we shall substitute a new notice to conform to the Order as modified.

(b) Make Ding and Jiang whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the judge's decision.

(c) Compensate Ding and Jiang for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file with the Regional Director for Region 29, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years.

(d) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharges, and within 3 days thereafter, notify the employees in writing that this has been done and that the discharges will not be used against them in any way.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its Westport, Connecticut facility copies of the attached notice marked "Appendix."[4] Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since December 8, 2017.

(g) Within 21 days after service by the Region, file with the Regional Director for Region 29 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. June 28, 2019

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| John F. Ring, | Chairman |
| Lauren McFerran, | Member |
| Marvin E. Kaplan, | Member |

(SEAL) NATIONAL LABOR RELATIONS BOARD

## APPENDIX

### NOTICE TO EMPLOYEES
### POSTED BY ORDER OF THE
### NATIONAL LABOR RELATIONS BOARD
### An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT discharge any of you for concertedly refusing to work an extra shift because of health and safety concerns or for engaging in other protected concerted activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, within 14 days from the date of the Board's Order, offer Liguo Ding and Jianming Jiang full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

[4] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

WE WILL make Liguo Ding and Jianming Jiang whole for any loss of earnings and other benefits resulting from their discharge, less any net interim earnings, plus interest, and WE WILL also make them whole for reasonable search-for-work and interim employment expenses, plus interest.

WE WILL compensate Liguo Ding and Jianming Jiang for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and WE WILL file with the Regional Director for Region 29, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years for each employee.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharges of Liguo Ding and Jianming Jiang, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the discharges will not be used against them in any way.

MATSU CORP. D/B/A MATSU SUSHI RESTAURANT

The Board's decision can be found at https://www.nlrb.gov/case/01-CA-214272 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

*Brent Childerhose, Esq.,* for the General Counsel.
*Benjamin B. Xue, Esq.,* for the Respondent.

## DECISION

### STATEMENT OF THE CASE

KENNETH W. CHU, Administrative Law Judge. This case was tried in Brooklyn, New York, New York, on July 30, 2018. The Flushing Workers Center filed the charge on February 2, 2018[1] and the General Counsel issued the complaint on March 29, 2018. The complaint alleges that the Matsu Corp. d/b/a Matsu Sushi Restaurant (Respondent) violated Section 8 (a)(1) of the National Labor Relations Act (Act) by discharging employees Liguo Ding and Jianming Jiang because they engaged in protected concerted activity by refusing to work under unsafe working conditions. On the entire record, including my observation of the demeanor of the witnesses[2], and after considering the briefs filed by the General Counsel and the Respondent[3], I make the following

### FINDINGS OF FACT

#### I. JURISDICTION

The Respondent has been engaged in operating a restaurant with an office and place of business located at 33 Jessup Road, Westport, Connecticut, serving food and beverages to thepublic. The Respondent denied jurisdiction in its answer, but based upon the testimony of Respondent's agent[4], I find that during the past 12 months, Respondent has purchased and received goods valued in excess of $5000 at its Westport restaurant from suppliers located outside the State of Connecticut (Tr. 18, 19). Therefore, I find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The Charging Party is a community organization that represents workers and is involved in employment and labor issues. As such, I find that the Flushing Workers Center is a labor organization under Section 2(5) of the Act.

#### II. ALLEGED UNFAIR LABOR PRACTICES

##### Background

The Respondent is a restaurant situated in Westport, Ct., approximately 50 miles from New York City. The Respondent serves cooked and raw (sushi) food to the public. The Respondent employs about 12 employees in the restaurant, including the wait staff, chefs and kitchen employees. Jianming Jiang (Jiang) and Liguo Ding (Ding) are kitchen chefs and share responsibilities in purchasing some of the groceries for the kitchen and in cooking the dishes.[5] Both worked for the Respondent for over 10 years.[6] Most of these employees, including Jiang and Ding, are transported to the restaurant by the Respondent in a company minivan from points in Queens, New York to the Westport

[1] All dates are in 2017 unless otherwise indicated.

[2] Witnesses testifying at the hearing were Jianming Jiang, Liguo Ding, Yan Lin, and Michael Cao.

[3] The exhibits for the General Counsel are identified as "GC Exh." The closing briefs are identified as "GC Br." and "R. Br." for the General Counsel and the Respondent, respectively. The hearing transcript is referenced as "Tr."

[4] Yan (Maggie) Lin testified that she is the manager of the Respondent's Westport restaurant and serves as the liaison between the two owners and the employees. Lin did not have the authority to hire and fire, but has the authority to schedule work shifts, approve leave, pay the workers, arrange for purchase orders, accept delivery of goods and conveys the instructions and messages from the owners to the workers. As such, I find that Yan Lin is a Sec. 2(13) agent under the Act and reject the Respondent's denial in its answer to the contrary. *Facchina Construction Co.*, 343 NLRB 886 (2004).

[5] The Respondent maintains in its answer to the complaint that Ding and Jiang were part-owners of the Matsu Corp., and not employees (GC Exh. 1). At the hearing, the Respondent admitted and stipulated that Ding and Jiang were employees as defined under the Act (Tr. 21).

[6] Ding started work at the restaurant in 2003 and Jiang in 2002 (Tr. 55, 83).

restaurant.

At the time of the hearing, the two principal owners were Michael Cao and Marty Cheng. Cao works at the restaurant and Cheng visits the restaurant on occasions (Tr. 13). Yan Lin (Lin) is the manager of the restaurant. In 2017, Cao and Cheng had an equal 29-percent share in the restaurant and Lin owned 10 percent. Cao testified that some of the workers also owned shares in the restaurant, including Jiang and Ding, who both owned 5 percent.[7] Cao also testified that Jiang and Ding would receive dividends from the restaurant's profits (Tr. 105, 106).

The restaurant is open from Monday through Thursday from 11 a.m. to 10 p.m. On Fridays, the hours were from 11 a.m. to 11 p.m. On the weekends, the hours are from 12 noon until 10 p.m. The Respondent provides transportation to and from the restaurant for the workers, including Jiang and Ding, who both reside in the Flushing, New York area. Jiang and Ding would usually purchase the groceries and other food items needed in the kitchen before they are transported to Westport. Ding testified that he usually buys the groceries around 8 a.m. and Jiang would be picked up about 8:30 a.m. before leaving in the company van (Tr. 56, 89). Both workers finish their shifts when the restaurant closes and are driven back to their residence by the Respondent. Both are usually home about 12 midnight.

Lin and Cao testified that the Westport restaurant would regularly receive large catering orders for up to 2000 patrons at least once every 4 months. On those occasions, the kitchen staff (including Jiang and Ding) would work an extra shift from 1 to 6 a.m. on the morning of the big order. As a consequence, both workers would be scheduled from 11 a.m. until 11 p.m.; resume preparing and cooking the food at 1 to 6 a.m. on the morning of the big order; and then continue to work on the big order when they begin their normal shift at 11 a.m. until the restaurant closed at 10 p.m. (Tr. 27).

Cao testified that Jiang and Ding were not continuously working for the entire day and night because they receive a 1-1/2-hour break and 2 30-minute meals. Cao also stated that on the morning of the big order, both workers were permitted to sleep on the restaurant's second floor at the end of the shift from 10 p.m. until 1:30 a.m. before resuming work from 1 a.m. to 6 a.m. After 6 a.m., Jiang and Ding could rest again on the upstairs floor until the start of their day shift at 11 a.m. (Tr. 110--116).

In contrast, Jiang and Ding testified that their core hours of work actually starts at 8 a.m. when they are required to purchase groceries and other food items before they are driven to the restaurant and their workday would end at 10 p.m. Ding testified that on the day before a big order, he and Jiang would begin work at 8 a.m. until 10 p.m. on the first day and continue working through the morning of the second day until 10 p.m. (Tr. 65, 66).

The Protected Concerted Activity

Ding testified that he had routinely worked the large catering orders throughout his tenure at the restaurant. Ding said that the long work hours were having a toll on his health and that he felt sick after working a big order in September 2017. At that point, Ding said he spoke to Jiang, that the 36-hour shift they had worked for the September big order was affecting his health. Jiang agreed that the big order in September also affected his health and they decided in September not to work the extra shift from 1to 6 a.m. on any future big catering orders (Tr. 57, 58).[8]

Ding and Jiang would also meet with the representatives and an attorney at the Flushing Workers Center (Center) to discuss their long work hours, wages, the big orders and other terms and conditions of their employment at the restaurant (Tr. 60). Deng and Jiang sought advice from the Center regarding the big orders and both agreed that they would refuse to work continuously for 36 hours. According to Ding, a representative from the Center advised that they should not work the entire 36 hours if it is harmful to their health (Tr. 61).

On December 5, Ding and Jiang were informed that there would be a large catering order for December 14. Ding testified that he phoned Jiang after the call and both reaffirmed their decision in September not to work extra hours on the big order.

On December 6, Ding was in the Respondent's van commuting to the restaurant along with Lin and the other workers. Jiang was not working on December 6. During the ride to work, Ding informed Lin that he and Jiang would not work the entire 36 hours. Ding said he would work his normal hours but not the 1 a.m. to 6 a.m. shift because it was affecting his health. According to Ding, Lin responded by asking if he would be willing to work one more big order on December 14 and Ding declined (Tr. 62, 73–75).

Jiang testified that he was also informed on December 5 of the big order for December 14. Like Ding, Jiang had numerous meetings with the representatives from the Center regarding his long hours and other employment issues with the Respondent. Jiang stated that he and Ding informed the representatives at the Center in September that they would not do another big order after feeling ill in completing the September order. Jiang said the representative informed them that they could refuse to work overtime if the work is a hardship on their health (Tr. 83-85, 92).

Jiang telephoned Lin on the evening of December 5 and told her that he and Ding will not work the big order because it affected their health. According to Jiang, Lin did not reply back but did implore him to work the order one last time. Jiang refused and replied that he and Ding had health issues working the long hours and their families were concerned over their well-being.

Jiang testified that he then called Ding and said he told Lin that they will not work the extra hours on the big order. According to Jiang, Ding replied that "that's fine" and that he will do the same when he goes to work the next day. Jiang also told Ding that he will talk to a lawyer at the Center the following day. Jiang stated that he was informed by an attorney at the Center that he can make his own decision whether to work the big order (Tr. 85, 86; 94–96).

Lin testified that she was informed by Ding in the company van on December 6 that he would not work the 36-hour shift on

[7] Ding disputed that he was a shareholder in the restaurant. He testified meeting with the representatives from the Flushing Workers Center in July 2017 for advice on how to get back a deposit he paid to Respondent so that he could work in the restaurant (Tr. 59).

[8] Ding and Jiang testified with a language interpreter. Deng's testimony regarding Jiang was mistakenly transcribed as "Cheng" in Tr. 61, 66 and 69. A reasonable reading of the transcript shows that Ding was referring to Jiang in his testimony and not to owner Cheng.

the big order. Lin said that Ding told her that the long hours made him sick (Tr. 29). Lin said that she communicated to the owners that Ding and Jiang would not work the big order. Lin conveyed the message that both workers stated that their health would be affected by working the long hours (Tr. 31, 32).

The Discharge of Ding and Jiang

On the afternoon of December 7, Ding was called into a meeting with Lin. Lin pleaded with Ding to work the big order and Ding said he would not work the early morning (1 to 6 a.m.) shift. Lin also asked Ding if his refusal to work was because the owners did not return Ding's deposit. Ding admitted that part of his reason for not working that shift, aside from his health, was the refusal of the owners to refund his deposit. Ding also stated that he will continue to work his normal hours. Ding also said that Lin threatened him that there would "be consequences" if he did not work on the big order (Tr. 62, 63; 75, 76).

On December 8, Ding received a call from Lin at home after returning from work. Ding was informed by Lin to rest and not return to work if his health was affecting his ability to work. Ding inquired as to when he could return to work and Lin was unresponsive. Ding testified that he made several calls to Lin after December 8 and received the same answer, that she did not know when he could return to work. Ding said the last time he called Yan about returning to work was in early January 2018. Ding admitted that he did not contact the principal owners about when he could return to work (Tr. 63, 64; 71–77).

On December 8, Jiang went to work and was asked again by Lin if he would work the big order. Jiang replied in the negative. Like Ding, Jiang admitted that his refusal to work was also because the owners refused to return his deposit (Tr. 100).

Jiang received a call from Lin after he returned home from work. Jiang was informed by Lin that since work affected his health; the owners decided that he should just rest at home. Jiang replied that his health issue was working the long shift and that he was capable of working his normal hours. Nevertheless, Lin told Jiang to stay home. Jiang told Lin that the owners were retaliating against him because he refused to work the 36-hour shift. Lin did not respond to his comment. Jiang admitted that he was not threatened by Lin for refusing to work on the big order (Tr. 96–99).

Jiang testified that he was not told by Lin when he could return to work and decided to contact Lin on December 13 as to when he could work again. Jiang also told Lin that he was still owed outstanding wages. Lin replied that the employer will pay his wages within a week. Lin also informed Jiang that she had not received any instructions from the owners as to when he could work again. Jiang said he made a few more calls afterwards and received the same answer from Lin (Tr. 86, 87).

Lin testified that she separately called Ding and Jiang in the evening of December 8 and informed them not to return and that they should rest. Lin also told them that they should contact her when they were ready to work after they rested (Tr. 31, 32). Lin denied that she was contacted by Ding and Jiang about returning to work after December 8 but admitted that Ding and Jiang did contact her about their outstanding wages (Tr. 45, 46; GC Exh. 3: affidavit of Yan Lin).

Cao testified that he was informed by Lin that Ding and Jiang did not want to work the big order. Cao denied that they had to continuously work for 36 hours. As noted above, Cao stated that the workers may rest after 10 p.m. and resume working on the order at 1 to 6 a.m. During the breaktime, the workers are permitted to rest and sleep. Cao denied that Ding and Jiang were discharged and denied that they were threatened for not completing the big order. Cao testified that he never told Lin to discharge Ding and Jiang. Cao testified that it would be difficult to fire them since he considered Ding and Jiang as partners in the restaurant. Cao also denied knowing why Ding and Jiang never returned to work after December 8 since neither one contacted him or the other owner after December 8. Cao asserted that Ding and Jiang most likely refused to work after December because of their attempt to recover the deposits on their failed investment in Matsuri Sushi that had closed in September (Tr. 118–-121).[9]

## Discussion Analysis

### Credibility Assessment

The credibility resolutions herein have been derived from a review of the entire testimonial record and exhibits, with due regard for the logic of probability, the demeanor of the witnesses, and the teachings of *NLRB v. Walton Mfg. Co.*, 369 U.S. 404, 408 (1962). A credibility determination may rely on a variety of factors, including the context of the witness' testimony, the witness' demeanor, the weight of the respective evidence, established or admitted facts, inherent probabilities and reasonable inferences that may be drawn from the records as a whole. *Double D Construction Group*, 339 NLRB 303, 305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001) (citing *Shen Automotive Dealership Group*, 321 NLRB 586, 589 (1996)), enfd. sub nom. 56 Fed.Appx. 516 (D.C. Cir. 2003). Credibility findings need not be all of all-or-nothing propositions—indeed, nothing is more common in all kinds of judicial decisions than to believe some, but not all, of a witness' testimony. *Daikichi Sushi*, supra.

### Legal Standard

The counsel for the General Counsel alleges that Liguo Ding and Jianming Jiang were discharged on December 8 because they engaged in protected concerted activity when they told Lin they would not work a 36-hour shift for health and safety reasons in violation of Section 8(a)(1) of the Act. The counsel for the Respondent maintains that Ding and Jiang were never discharged and they never contacted the Respondent about returning to work after they were allowed to rest after being informed of their health issues.

The complaint alleges that the Respondent interfered, restrained and coerced employees in the exercise of the rights guaranteed in Section 7 of the Act in violation of Section 8(a)(1) of

[9] I had allowed limited testimony solely for background information regarding another restaurant also owned by Cao and Cheng. At the time, Cao and Cheng were principals in the Matsu Corporation. The Respondent Matsu purchased a second restaurant named Matsuri Sushi. Ding and Jiang were investors in Matsuri Sushi in August 2015, but the restaurant closed in September 2017. Cao testified that Ding and Jiang argued with him and Cheng for the return of their investment in the failed restaurant. Cao stated this was the reason for Ding and Jiang refusing to work the big order on December 14 (Tr. 18; 105–109).

the Act. Section 7 provides that "employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . [Emphasis added]." See, *Brighton Retail, Inc.*, 354 NLRB 441, 447 (2009). Section 8(a)(1) provides that it is an unfair labor practice to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7. Discharging and disciplining employees because they engaged in activity protected by Section 7 is a violation of Section 8(a)(1).

Ding and Jiang Engaged in Protected Concerted Activity

In *Meyers Industries (Meyers 1)*, 268 NLRB 493 (1984), and in *Meyers Industries (Meyers 11*), 281 NLRB 882 (1986), the Board held that "concerted activities" protected by Section 7 are those "engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself." The activities of a single employee in enlisting the support of fellow employees in mutual aid and protection is as much concerted activity as is ordinary group activity. Individual action is concerted so long as it is engaged in with the object of initiating or inducing group action. *Whittaker Corp.*, 289 NLRB 933 (1988); *Mushroom Transportation Co. v. NLRB*, 330 F.2d 683, 685 (3d Cir. 1964). The object of inducing group action need not be express. The Act also protects concerted activities for mutual aid or protection regardless of whether a union is involved. *Alton H. Piester*, 353 NLRB 369, 371 (2008).

I find that Ding and Jiang engaged in protected concerted activity when they mutually agreed after the September large catering order that they will not work another big order with a 36-hour work shift due to their health and the concerns of their family over their safety in working long hours. Ding and Jiang were concerned for their health in working long hours with the extra 1 to 6 a.m. shift added to their workday for the big order. Ding and Jiang had multiple discussions and concerns over the 36-hour shift on their health and wellbeing and elicited each other support before they separately confronted the Respondent about their work shifts.[10] Ding and Jiang also sought advice from the Center for the reasonableness of their refusal to work before approaching Lin with their concerns. Yan Lin was informed by the workers of their concerns and Ding and Jiang referred to each other when they separately informed Lin that they would not work all the shifts for the big order.

Concerted activity includes not only activity that is engaged in with or on the authority of other employees, but also activity where individual employees seek to initiate or to induce or to prepare for group action, as well as individual employees bringing truly group complaints to the attention of management. *Fresh & Easy Neighborhood Market*, 361 NLRB 151 (2014). Actions taken by the two workers were for mutual aid or protection and their refusal to work under conditions affecting their health is an activity to "improve terms and conditions of employment or to otherwise to improve their lot as employees." *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565 (1978).

The *Wright Line* Analysis

In order to determine whether an adverse employment action violated the Act, the Board applies the analysis articulated in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). To establish unlawful discipline under *Wright Line*, the counsel for the General Counsel must first prove, by a preponderance of the evidence, that the employee's protected concerted activities were a substantial or motivating factor in the employer's decision to take action against them. *Manno Electric, Inc.*, 321 NLRB 278, 280 (1996). The General Counsel makes a showing of discriminatory motivation by proving the employee's protected concerted activity, employer knowledge of that activity, and animus against the employee's protected conduct. *Naomi Knitting Plant*, 328 NLRB 1279, 1281 (1999). Proof of an employer's motive can be based upon direct evidence or can be inferred from circumstantial evidence, based on the record as a whole. *Ronin Shipbuilding*, 330 NLRB 464 (2000); *Robert Orr/Sysco Food Services*, 343 NLRB 1183 (2004).

To rebut the presumption established by the General Counsel, the Respondents bears the burden of showing the same action would have taken place even in the absence of protected conduct. See *Manno Electric, Inc.,* 321 NLRB 278, 280 fn. 12 (1996); *Farmer Brothers, Co.,* 303 NLRB 638, 649 (1991). To meet this burden "an employer cannot simply present a legitimate reason for its action but must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected conduct." *Roure Bertrand Dupont, Inc.*, 271 NLRB 443 (1984); *Durham School Services, L.P.*, 360 NLRB 694 (2014); *DirecTV U.S. DirecTV Holdings, LLC*, 359 NLRB 545, 560 fn. 18 (2013).

Discriminatory motive may be established in several ways including through statements of animus directed to the employee or about the employee's protected activities, *Austal USA, LLC*, 356 NLRB 363, 363 ( 2010); the timing between discovery of the employee's protected activities and the discipline, *Traction Wholesale Center Co. v. NLRB*, 216 F.3d 92, 99 (D.C. Cir. 2000); evidence that the employer's asserted reason for the employee's discipline was pretextual, such as disparate treatment of the employee, shifting explanations provided for the adverse action, failure to investigate whether the employee engaged in the alleged misconduct, or providing a nondiscriminatory explanation that defies logic or is clearly baseless, *Lucky Cab Co.*, 360 NLRB 271 (2014); *ManorCare Health Services—Easton,* 356 NLRB 202, 204 (2010); *Greco & Haines, Inc.,* 306 NLRB 634,

[10] While the complaint alleges that Ding and Jiang complained about their 36-hour work shift on the day prior to and during the big order, the testimony from the hearing disputes the actual time spent working inasmuch as the workers calculated their commute time in their hours worked and the Respondent maintained that there were a 90-minute break and 2 30-minute meals as well as rest periods before the early morning 1 to 6 a.m. shift and at the end of that shift and before the beginning of the 11 a.m. shift (Tr. 102, 103). Nevertheless, by anyone's calculations, the work hours before and during the day of the big order were arborous because their hours included the 1 to 6 a.m. shift that affected the health of Ding and Jiang. I agree with the counsel for the General Counsel that the actual hours work does not diminish the merit of their claim and is irrelevant in assessing a violation of the Act by the Respondent.

634 (1992); *Wright Line*, 251 NLRB at 1088 fn. 12, *citing Shattuck Denn Mining Co. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966); *Cincinnati Truck Center*, 315 NLRB 554, 556–557 (1994), enfd. sub nom*.; NLRB v. Transmart, Inc.*, 117 F.3d 1421 (6th Cir. 1997)).

I find that the counsel for the General Counsel has met his burden that the discharge of Ding and Jiang was motivated by their protected concerted activity and that the Respondent failed to show that it would have taken the same action absent the protected activity of Ding and Jiang.

Here, Ding and Jiang informed Lin that they would not work the long hours, but were willing to continue working their normal hours. Lin then informed Cao and Cheng of their refusal to work the big order. Instead of letting them work their regular shift and forego the 1 to 6 a.m. shift, the owners instructed Lin to tell them not to return to work after December 8. This point is noteworthy since both Lin and Cao testified that they needed workers to complete the big order and Lin actually asked Ding on December 7 if he would reconsider his decision not to work. In addition, the restaurant was very busy during the December holiday month (as noted by the counsel for the Respondent). If completing the big order was a priority, it is beyond my understanding why Ding and Jiang could not work their normal shifts and have other workers substitute for the 1 to 6 a.m. shift. Clearly, the Respondent was upset that Ding and Jiang had the temerity to refuse working the early morning shift. The Respondent showed its animus towards their concerted activity when Lin told Ding there would "be consequences" if he did not work on the big order.

I also find as pretext that the reason Ding and Jiang did not return to work was because they never contacted the Respondent after December 8. The Respondent maintains that Ding and Jiang were allowed to rest and recover from their health issues and that they should call when they are able to work. Lin testified that neither worker contacted her to return to work after December 8.

This is obviously inconsistent with the objective facts in the record. I credit the testimony of Ding and Jiang that they told Lin they were always willing to work their normal shifts but refused to work the 1 a.m.-6 a.m. shift during the big order. Ding and Jiang never refused to totally stop working. Furthermore, I find it pretextual that Lin and Cao claimed that the two workers never contacted them after December 8 to work.[11] I credit the testimony of Ding and Jiang that they did call after December 8 and Lin was unresponsive to their request to return to work. Lin testified that Ding and Jiang were owed back wages when they had stopped working on December 8. Lin stated that the Respondent subsequently paid the outstanding wages of both workers. It is reasonable to conclude that when Ding and Jiang were paid their back wages, both workers would have asked Lin when they could return to work.

Finally, and most damaging, is the fact that the Respondent admitted to the Board that the two workers were indeed discharged for refusing to work. Lin stated in her Board affidavit that Ding and Jiang were fired on December 8 (GC Exh. 3). Co-owner Marty Cheng also provided an affidavit to the Board that stated under oath that Jiang and Ding refused to complete a large catering order and "Because of their defiance, they were fired on or about December 8, 2017" (GC Exh. 4).[12]

Employees, under the Act, are privileged to seek to change their terms and conditions of employment by concertedly requesting a change, concertedly protesting their employer's failure to grant a specific request or demand, and, ultimately, by engaging in a work stoppage or strike. When employees engage in work stoppage, the stoppage must be complete. The employees must withhold all their labor. "They cannot pick and choose the work they will do or when they will do it." *Audubon Health Care Center*, 268 NLRB 135, 137 (1983). They cannot decide for themselves "which rules to follow and which to ignore." *Bird Engineering*, 270 NLRB 1415 fn. 3 (1984).

However, it is well settled that unrepresented employees may concertedly decline to perform certain work they deem unsafe without being punished or discharged. *NLRB v. Washington Aluminum Co.*, 370 U.S. 9 (1962). In *Sargent Electric Co*., 237 NLRB 1545 (1978), and *Union Boiler Co*., 213 NLRB 818 (1974), the employees refused to perform work due to what they perceived, at the time of refusal, to be unsafe working conditions. The employees were discharged for refusal to obey the order to perform the very work that was the subject of their concerted protest. Here, Ding and Jiang refused to perform work that they perceived were unsafe working conditions affecting their health. The employees had no option but to abandon their protected concerted activity or risk termination. The Board, in those circumstances, found that the concerted refusal to perform the work was protected activity and that termination for that activity violated the Act.

The Respondent believes that the reason that Ding and Jiang refused to work was because the owners did not return the money allegedly owed to them from an investment that went sour and points to the fact that Ding and Jiang never refused to work the big orders in the past or complained that past big orders had affected their health.

While there may be other factors, I find above that their discharges were clearly motivated by their protected concerted activity in refusing to work the early shift and I need not address the reasonableness of their concerted activity. In *Tamara Foods Inc*., 258 NLRB 1307, 1308 (1981), enfd. 692 F.2d 1171 (8th Cir. 1982), the Board stated that "[i]nquiry into the objective reasonableness of employees' concerted activity is neither necessary nor proper in determining whether that activity is protected." 258 NLRB at 1308. "Whether the protested working

[11] It is irrelevant that neither Ding nor Jiang had asked the owners to return to work after December 8. They made their requests to Lin, who as an agent of the Respondent, served as the intermediary between the owners and the employees in all work-related issues.

[12] The counsel for the Respondent argues that Lin and Cheng were not fully familiar with the English language and did not understand the statements in the affidavit that were prepared for their sworn signatures. The Respondent further argues that the former attorney was not Chinese speaking and could not translate so that Lin and Cheng would understand the contents of their affidavits. While I could empathize to the language barrier, I find such arguments are without merit. The previous attorney had an obligation and duty to represent his two clients and to refuse their signatures unless Lin and Cheng fully understood their statements in the affidavits. The attorney could have requested to reconvene the taking of the affidavits when a translator would be available to explain the affidavits to Lin and Cheng.

condition was actually as objectionable as the employees believed it to be . . . is irrelevant to whether their concerted activity is protected by the Act." Id.; *Odyssey Capital Group, L.P., III,* 337 NLRB 1110, 1111 (2002).

In any event, the Respondent admitted in its Board affidavits that Ding and Jiang were discharged in refusing to work the big order. Accordingly, I find that the Respondent violated Section 8(a)(1) of the Act.

## CONCLUSIONS OF LAW

1. At all material times, the Respondent, Matsu Corp., d/b/a Matsu Sushi, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Respondent violated Section 8(a)(1) of the Act on about December 8, 2017, by discriminatorily terminating Liguo Ding and Jianming Jiang.

3. The unfair labor practices described above affect commerce within the meaning of Section 2(6) and (7) of the Act.

## REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, the Respondent having discriminatorily discharged Liguo Ding and Jianming Jiang, I shall order the Respondent to offer Ding and Jiang full reinstatement to their former positions or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other employee emoluments, rights or privileges previously enjoyed, and to make them whole for any loss of earnings suffered as a result of the Respondent's unlawful actions against them. Backpay shall be computed in accordance with *F. W. Woolworth Co*., 90 NLRB 289 (1950), with interest as prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010).

In accordance with *Don Chavas, LLC, d/b/a Tortillas Don Chavas*, 361 NLRB 101 (2014), my recommended order requires Respondent to compensate Liguo Ding and Jianming Jiang for the adverse tax consequences, if any, of receiving a lump-sum backpay award and to file with the Regional Director for Region 29 within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years. *AdvoServ for New Jersey*, 363 NLRB No. 143 (2016).

In addition to the remedies ordered, I shall recommend that the Respondent compensate Liguo Ding and Jianming Jiang for their search-for-work and interim employment expenses regardless of whether those expenses exceed their interim earnings. *King Soopers, Inc*., 364 NLRB No. 93 (2016). Search for work and interim employment expenses shall be calculated separately from taxable net backpay, with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, supra.

It is further recommended that Respondent remove all references to the termination on about December 8, 2017, from the files of Liguo Ding and Jianming Jiang and to notify them in writing that it has done so and that the discharges will not be used against them in any way.

My recommended order requires the Respondent to expunge from its files any and all references to the unlawful termination of Liguo Ding and Jianming Jiang and any notes, documents or references regarding their termination that were prepared and/or used in their termination and to notify them in writing that this has been done and that the unlawful discharges will not be used against them in any way.

On these findings of facts and conclusions of law and on the entire record, I issue the following recommended[13]

## ORDER

The Respondent, Matsu Corp., d/b/a Matsu Sushi, its officers, agents, successors, and assigns, shall

1. Cease and desist from

Discharging, or otherwise discriminating against employees because they engaged in protected concerted activities.

In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make Liguo Ding and Jianming Jiang whole for any loss of earnings and other benefits, including reimbursement for all search-for-work and interim-work expenses, regardless of whether they received interim earnings in excess of these expenses, suffered as a result of the unlawful discharges, as set forth in the remedy section of this decision.

(b) Compensate Ding and Jiang for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and to file with the Regional Director for Region 29 within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years.

(c) Immediately offer full reinstatement to Ding and Jiang and if the offer is accepted, reinstate Ding and Jiang to their former jobs or, if the jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(d) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful discharge of Ding and Jiang on about December 8, 2017, and thereafter notify them in writing that this has been done and that their discharges will not be used against them in any way.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

(f) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records,

[13] If no exceptions are filed as provided by Sec. 102.46 If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay. Absent exceptions as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Section 102.48 of the Rules, be adopted by the Board and due under the terms of this Order.

(g) Within 14 days after service by the Region, post at its existing property at the Westport, restaurant, 33 Jessup Road, Westport, Connecticut, a copy of the attached notice in the English and Chinese languages marked "Appendix."[14] Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since December 8, 2017.

(h) Mail a copy of said notice to Liguo Ding and Jianming Jiang at their last known addresses.

(i) Within 21 days after service by the Region, file with the Regional Director for Region 29, a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. October 26, 2018

## APPENDIX

### NOTICE TO EMPLOYEES
### POSTED BY ORDER OF THE
### NATIONAL LABOR RELATIONS BOARD
### An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

### FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefits and protection

Choose not to engage in any of these protected activities.

WE WILL NOT discharge or otherwise discriminate against you because you engage in protected concerted or to discourage you from engaging in these or other concerted activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Liguo Ding and Jianming Jiang full reinstatement to their former jobs or, if the jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Liguo Ding and Jianming Jiang whole for any loss of earnings and other benefits resulting from their discharge, less any net interim earnings, plus interest, including any pay increases made to similarly situated employees from the date of their discharge date to the present, and including reimbursement for all search-for-work and interim-work expenses, regardless of whether they received interim earnings in excess of these expenses, or at all, during any given quarter, or during the overall backpay period.

WE WILL compensate Liguo Ding and Jianming Jiang for the adverse tax consequences, if any, of receiving a lump-sum backpay award.

WE WILL, within 14 days from the date of the Board's Order, remove from our files all references to the unlawful discharge of Liguo Ding and Jianming Jiang.

WE WILL, within 3 days thereafter, notify Liguo Ding and Jianming Jiang in writing that this has been done and that their discharge will not be used against them in any way.

MATSU CORP., D/B/A MATSU SUSHI

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/01-CA-214272 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

[14] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."